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SPECIAL REPORT

"COMPETITION ACT"

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A summary of views on the proposed Competition Act

(Bill C-256)

February, 1972

Economic Research Branch,
Department of Industry & Commerce
Room 1502, Centennial Building,
Edmonton, Alberta.

Minister:

Hon. F. H. Peacock

Deputy Minister:

R. G. McFarlane

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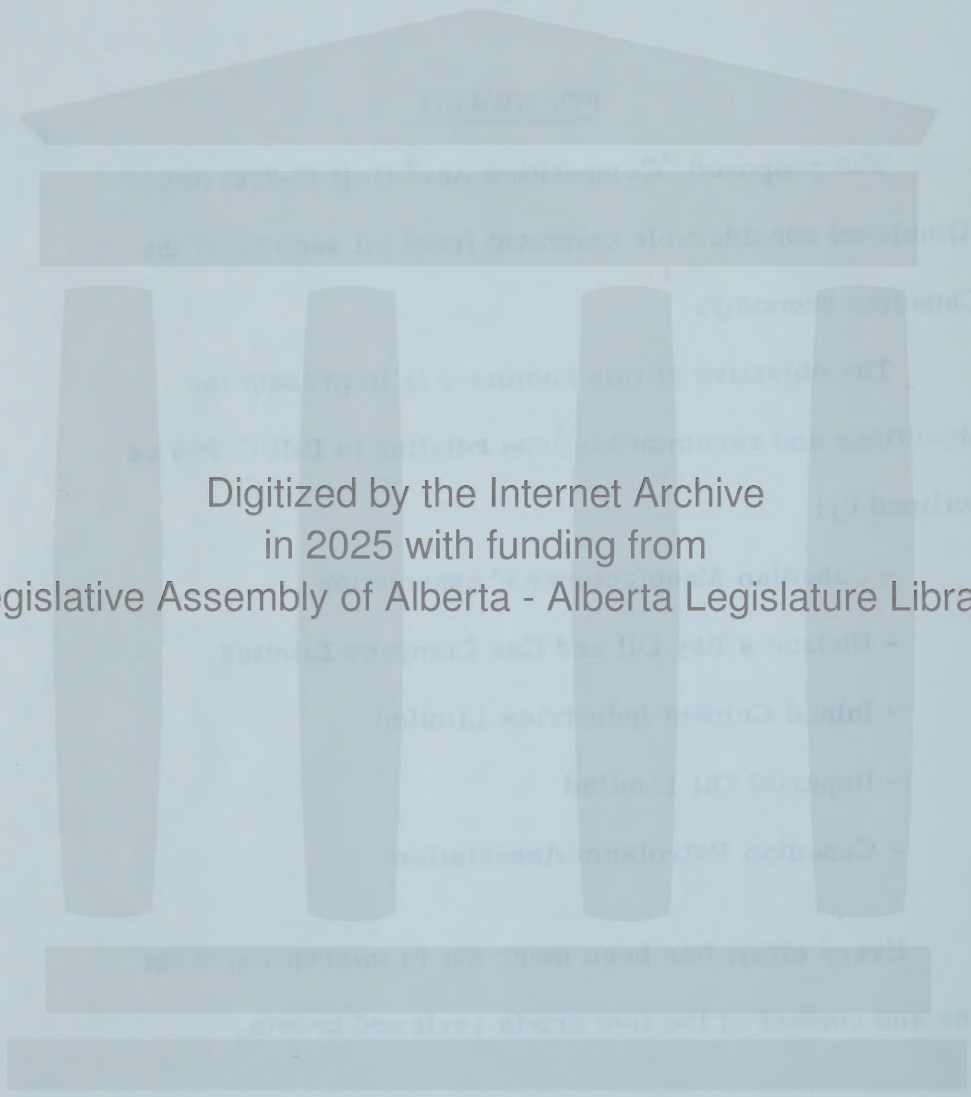
FOREWARD

The proposed "Competition Act" (Bill C-256) has stimulated considerable comment from all sectors of the Canadian economy.

The objective of this summary is to present the objections and recommendations relating to Bill C-256 as outlined by:

- Canadian Manufacturer s' Association
- Hudson's Bay Oil and Gas Company Limited
- Inland Cement Industries Limited
- Imperial Oil Limited
- Canadian Petroleum Association

Every effort has been made not to misrepresent the tone and content of the five briefs reviewed herein.



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SUMMARY

In August, 1969, The Economic Council of Canada recommended "...a revised approach to anticombines or competition policy, based on a mixture of criminal and civil law and with the single clear objective of furthering the interest of the Canadian consumer in an efficiently working economy".

In light of the recommendations and suggestions made by the E.C.C., the Federal Government last year introduced Bill C-256 to replace the confusing and outdated "Combines Investigation Act". Submitted just before the June, 1971, adjournment of Parliament, Bill C-256 has stimulated considerable comment from the private sector. To February 8, 1972, approximately 270 submissions have been received by the Federal Department of Consumer and Corporate Affairs strongly urging revisions to the tabled Bill.

Alberta's Economic Research Branch has received for summary and review copies of documents from the following interested parties:

- Canadian Manufacturers' Association
- Hudson's Bay Oil and Gas Company Limited
- Inland Cement Industries Limited
- Imperial Oil Limited
- Canadian Petroleum Association

As well, numerous comments were enumerated in a previous Economic Research Branch submission entitled "Executive Report - 1972, Comments On The 'Competition Act'" where almost one hundred comments were recorded by Alberta's leading business executives.

The concern over Bill C-256 as noted by these executives

and the more comprehensive documents considered here suggests that before the Bill can be realistically considered in Parliament, major revisions are imperative.

The opinions of the nearly one hundred executives and the more comprehensive briefs suggest that a revised competition policy is necessary to meet the general recommendations of the Economic Council of Canada. The apparent deviations from the Council's recommendations lead the business community to suggest that the authors of Bill C-256 did not realistically consider the intent of the Council's report. However well intentioned Bill C-256 may be, there appears to be sufficient grounds to warrant careful and comprehensive re-examination of all aspects of the Bill including the basic philosophy of free enterprise competition and the conditions upon which portions of the final legislation will be interpreted and enforced.

The philosophy behind Bill C-256 is challenged by the Canadian Petroleum Association:

> The members of the Association are engaged in a highly competitive business. Therefore, they are not opposed to the principle of realistic and fair regulation of business in the public interest to promote competition and to prohibit or restrict certain undesirable trade practices.
>
> However, it is the view of the Association that the Act is unrealistic and too restrictive in nature. In this connection it deviates considerably from the recommendations of the Economic Council of Canada.
>
> The Act is obviously consumer-oriented with a decided bias against business and has apparently been drafted by those who lack business experience and practical knowledge of the everyday business facts of life. As a

result, a further deterioration of business could develop and, therefore, it is submitted that the Act could not operate to the overall benefit of the country.

Because the Act contains so many restrictions in connection with current business practices that do not unduly or unreasonably affect competition it can only be concluded that the real intention is not to promote competition but to regulate and control competition on a theoretical basis in both the domestic and export markets. The implementation of such a policy could seriously undermine the entire business structure of Canada.

The Association challenges the principle that absolute and unlimited competition is the sole criterion for judging business fairness and efficiency and the assumption that such a criterion will necessarily achieve the anticipated beneficial economic and social objectives. Efficiency in business cannot be obtained by legislation. Competition should not be a "be-all and an end-all". It should only be a means to an end and that end should not just be each individual consumer. The Association is of the view that the measurement of competition and efficiency should be the effect of business on the total public interest and the economy as a whole.

Accordingly, it is concluded that the Act is so broad in scope and so restrictive in nature that it would create a morass of uncertainty and impose a straitjacket of bureaucratic control on business which in the long run could stifle oil and gas operations in Canada and the economic development of the country.

In view of the foregoing, it is strongly recommended that the philosophy of the Act be re-considered so that a realistic competition policy can be developed that will, to the greatest extent possible, be geared to the total public interest and the economy as a whole by encouraging the flexibility and initiative that is so essential to business and containing only such restraints against freedom of business action that are considered to be absolutely necessary to achieve such purpose.

The above quote should not be construed to suggest that all aspects of the Bill are totally unacceptable. The Canadian Manufacturers' Association

in their newsletter, "Industry", points out some constructive aspects of Bill C-256:

> "Industry" is by no means opposed to everything in the Bill. Essentially, it approves the shift from exclusive reliance on criminal law to a new civil law jurisdiction; and it is pleased that a Tribunal, different from the courts which presently exercise criminal jurisdiction under the Combines Investigation Act, would be able to look at economic criteria in deciding whether commercial conduct is desirable.

In total, the need of legislation to substitute for the present "Combines Investigation Act" is recognized. However, the present Bill C-256 represents an unacceptable attempt to provide a viable alternative. In fact, as the representations and summations given herein suggest, the introduction of Bill C-256 has contributed an element of uncertainty to Canada's economic environment.

THE CANADIAN MANUFACTURERS' ASSOCIATION

In the November - December, 1971, issue of "Industry", the position of the Canadian Manufacturers' Association on the proposed Bill C-256 is editorialized. The position is that a re-structuring of the "Combines Investigation Act" is necessary. Nevertheless, fundamental amendments to Bill C-256 are still required which will offer the consumer protection without restricting competition with a "legislative straitjacket". On the other hand, certain "agreements" appearing in the proposed Bill do not appear to be "vital" to the cause of consumer protection.

Most 'vertical' agreements, for example, between manu-

facturers and wholesalers or jobbers for the supply, service or distribution of a product, would be illegal. All specialization, export and franchise agreements would constitute a criminal offence unless registered with the proposed Tribunal. (Presumably because of a drafting error, this exemption is not provided for mergers. Unless it is, most mergers will be illegal.)

The editorial concludes with statements made by several Canadian business leaders on joint ventures, the proposed Tribunal and discounts for volume purchases. These statements are stronger in opposition to the proposed competition policy than the editorial itself.

HUDSON'S BAY OIL AND GAS COMPANY LIMITED

Mr. D. C. Jones, President, Hudson's Bay Oil and Gas Company Limited elaborates on how the legislation in question creates uncertainties in the Canadian economy."... such proposed procedure can be extremely detrimental to the economy even though the proposed Bill would be radically changed." The first general criticism of Bill C-256 relates to criminal offences per se. The drafting of an all-inclusive set of "exception clauses" will lead to uncertainty within the business community and will result in a series of litigations to test these exceptions. This approach does not lead to a common understanding of what is a "criminal offence" under the terms of the Bill.

Hudson's Bay Oil and Gas Company Limited is particularly concerned with the departure from the fundamental principle in criminal law that a party is presumed innocent until proven guilty. (See Sections 16(2), 73(5), 85(1) and 87(2)). As well, Mr. Jones suggests that transactions which have a "neutral effect" on competition need to be detailed and more adequately

defined.

Another area of concern to Hudson's Bay Oil and Gas Company Limited is the Bill's method of controlling undesirable mergers:

> While recognizing the need for some degree of control, we question the necessity of the very extensive powers of surveillance, prohibition, dissolution and modification given to the Tribunal and the prolonged period within which objection can be taken. These complex procedures could create such uncertainty and cause such administrative complications and difficulties as to render mergers practically unattractive to the business community as a means of improving efficiency or accomplishing growth. We strongly recommend adoption of simpler and more streamlined procedures and the elimination of dissolution of a completed merger as a remedy except when there has been fraudulent misrepresentation or material non-disclosure.

Possibly of most significance to the entire oil and gas industry is the serious limitations which the Bill imposes on "joint-operating agreements" and similar arrangements that are to prevent or limit exploration and production. "Joint ventures" have been used in the past not only in Canada but throughout the world to achieve the necessary spreading of high-risk investments which are inherent in the exploration and development phases of the oil and gas industry. Mr. Jones cites his own firm as an example where all of the production of natural gas and related products is obtained from jointly owned fields and facilities.

The Appendix to Mr. Jones' letter requests re-definition of "joint venture", "market", "merger" and "monopoly position". Examples of inadequacies and poor drafting of Bill C-256 are presented as comments on Sections 16, 17, 20, 27(2), 31, 32, 34, 37, 38, 46, 64, 85, 89 and 92.

INLAND CEMENT INDUSTRIES LIMITED

Mr. D. R. B. McArthur, President, Inland Cement Industries Limited, states that his company supports the broad goal or intent of Bill C-256. Further, he recognizes and endorses the intent to accomplish greater efficiency within the Canadian economy by rescinding the present "Combines Investigation Act" and enacting new legislation. Also, Mr. McArthur supports the legislation"...which will bring many matters relating to competition into civil law under a 'Competitive Practices Tribunal' rather than under criminal law as is the case in the present 'Combines Act'."

Notwithstanding Mr. McArthur's support for a revised competition policy, major revisions to the proposed legislation are required. Particular concern and suggested changes were recorded in the following areas:

- the matter of "undueness" - Section 16(1);
- identical tenders - Section 16(3);
- exceptions - Section 16(3);
- monopolization - Section 17;
- definition of monopoly positions - Section 41;
- price discrimination - Section 37(a), Section 38; and
- delivered pricing - Section 37(b), Section 42.

Mr. McArthur's main concern appears in areas which relate directly to pricing. Inland Cement Industries Limited employs a pricing system commonly referred to as "base mill pricing" which would become illegal under the proposed Competition Act.

In conclusion Mr. McArthur provided constructive comments on the question of the lack of appropriate appeal procedures in the proposed Bill. He suggests how the appeal procedure could more effectively be set up. Other comments relate to the "public interest" and "tribunal membership".

IMPERIAL OIL LIMITED

The first section of Imperial Oil's brief contains a summary statement of the principles upon which a Canadian competition policy should be based. It concludes that these are compatible with the Economic Council's "Interim Report". The second part is an analysis of how Bill C-256 departs from the Economic Council's recommendations. The third looks at the role of the Tribunal with the fourth examining specific business situations and practices which would be affected by the legislation. Recommendations and conclusions provided by Mr. W. O. Twaits, Chairman and Chief Executive of Imperial Oil Limited are as follows:

1. Two exemptive provisions or procedures should be adopted. The tribunal should be given specific power for a temporary initial period to exempt trade arrangements and practices in existence at the time the civil review provisions are proclaimed. Proclamation of the criminal provisions should be delayed for at least a year after passage of the Act in order to permit any necessary rearrangements required by a change in the existing criminal law.

2. Running through many of the definitions of suspected actions and practices, through many of the prohibitions leading to criminal conviction, and through the exceptions or gateways is a bias against "big business". This bias is primarily the result of neglect or misunderstanding of the concomitants of effective competi-

tion. Vigorous and effective competition, including price competition, by one competitor will affect the entry or expansion of other competitors. This is desirable competition and of public benefit, but is proscribed or threatened if engaged in by big business. It is unrealistic and harmful to require one set of competition rules for one competitor and another set of rules for others.

3. The constitutional validity of the civil law provisions and particularly whether the authority of the tribunal is within the legislative jurisdiction of Parliament should be referred by the government to the Supreme Court of Canada. To wait for a ruling based on a private action would not provide an early answer to a problem which is very real and would, we believe, be an abrogation of the government's responsibility. A stated case was presented to the court in 1920 "In re the Board of Commerce Act and the Combines and Fair Prices Act, 1919" on the last occasion when business practices related to competition requirements were made subject by the federal government to civil review.

4. The basic concepts of the Bill, involving service industries, the division between criminal and civil jurisdiction and the need for a separate tribunal can and should be preserved. But the role of competition in achieving economic and social goals, the types of business agreements and practices which require criminal prohibition or civil review and the basic philosophy relating to the depth and nature of government intervention in a market economy require re-examination of the Economic Council's recommendations and a more pragmatic approach to Canada's new competition policy.

CANADIAN PETROLEUM ASSOCIATION

The submission by the Canadian Petroleum Association deals with, in general, the tone of the proposed Bill C-256 and more specifically the effect of the proposed Bill on the petroleum industry.

The philosophy of Bill C-256 is taken to task whereby the principles incorporated into the Bill are considered restrictive, unrealistic and unfair to all industries. In this regard the Bill deviates considerably from the Economic Council's recommendations.

> Because the Act contains so many restrictions in connection with current business practices that do not unduly or unreasonably affect competition, it can only be concluded that the real intention is not to promote competition, but to regulate and control competition on a theoretical basis in both domestic and export markets. The implementation of such a policy could seriously undermine the entire business structure in Canada.

Further, the Association feels that

> ...the enactment of Bill C-256 would create a morass of uncertainty and impose a straitjacket of bureaucratic control on business which in the long run could stifle oil and gas exploration in Canada and the economic development of the country.

Listed below are the recommendations of the Canadian Petroleum Association with respect to Bill C-256:

1. Philosophy:
   In view of the foregoing it is strongly recommended that the philosophy of the Act be re-considered so that a realistic competition policy can be developed that will, to the greatest extent possible, be geared to the total public interest and the economy as a whole by encouraging the flexibility and initiative that is so essential to business and containing only such restraints against freedom of business action that are considered to be absolutely necessary to achieve such purpose.

2. Joint Venture:
   That the definition of Joint Venture and its application be deleted from the Act if the concept of 'undueness'

is adopted in connection with the per se offences of the the Act, or in the alternative, that the definition of Joint Venture be amended to specifically exempt Joint Ventures in the oil and gas industry, or in the further alternative that the definition of Joint Venture be amended by deleting subparagraph (b) thereof.

3. Market:
Since the definition of market fails to define what a market actually is and its broadness of scope could lead to such onerous results, it is recommended that it be deleted entirely as in the case of the Combines Investigation Act, or that the definition be amended to specifically exempt oil and gas exploration, production, gas processing and pipe line operations.

4. Prohibited Agreements and Arrangements:
(a) That all of the prohibitions be made subject to a criterion of having an undue effect on competition with regard to the public interest, and that such prohibitions be limited to operations in Canada.

(b) Delete the expression or any other terms or conditions in paragraphs (a) and (b) of Section 16(1).

(c) That previous recommendations regarding the definitions of 'joint venture' and 'market' be adopted.

(d) That the status of Specialization Agreements and Export Agreements be clarified, and the term of Specialization Agreements be made the same as for Export Agreements.

(e) That monopolies and mergers be made an exception to the criminal Sections of the Act.

5. Monopolies:
1. That the definition of monopoly set forth in the Combines Investigation Act be retained (thereby making any reference to 'market' unnecessary).

2. That monopolization be removed from the field of criminal law.

6. The Tribunal:

(a) That both the powers and the uncontrolled discretion of the Tribunal be reduced to the extent necessary that will permit it to protect the public interest against predatory business practices but at the same time be instrumental in promoting competition and encouraging business to assist Canada in achieving the highest degree of economic prosperity possible.

(b) That any criteria to be used by the Tribunal should be more clearly defined and more flexible.

(c) That the Tribunal not be allowed to delegate such extensive authority to hearing officers. Also any party should, on application, be entitled to a hearing before the Tribunal instead of a hearing officer.

(d) That the Tribunal shall hear all appeals from a hearing officer if requested by any party to the proceedings.

(e) That all evidence to be considered by the Tribunal should form part of the record with the right of any party to the proceedings to offer rebuttal or to conduct cross-examination.

(f) That since the Tribunal will be dealing with matters that will have far-reaching effects, it should be required to adhere to ordinary rules of evidence.

(g) The procedural rules of the Tribunal should be simplified as much as possible.

(h) The Tribunal be required to deliver written reasons for its decisions and to publish them.

(i) All guidelines of the Tribunal should be published and be binding upon the Tribunal and the business or industry concerned.

(j) Speedy advance rulings and consent orders should be obtained in most instances without the necessity of a hearing.

(k) Any party affected by an order of the Tribunal should have the right to apply to the Tribunal for

modification or cancellation of such order.

(l) That under no circumstances should the Tribunal be permitted to modify any arrangement or impose its own business decisions on any person without the consent of the person or persons affected.

7. Mergers:

(a) That mergers should only be examined on a highly selective basis.

(b) That the grounds for disapproving mergers should only be based on effects adverse to competition and public interest, after a hearing.

(c) That registration of mergers should be eliminated.

(d) That provision should be made for speedy prior rulings on mergers upon application and without a hearing.

(e) That mergers should be exempted from the criminal provisions of the Act.

(f) That the acquisition of a part of a business and the formation of a partnership or a new entity be deleted from the definition of "merger".

(g) That 'control' be amended to mean more than 50% ownership.

(h) That hearings in connection with consent orders be abolished.

(i) That a right of appeal to the Courts on the merits be granted.

NOTE: The Canadian Petroleum Association has offered further comment and recommendations dealing in areas not directly related to the oil and gas industry per se. These comments are contained in the Association's brief pages 22 to 28 inclusive.

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